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CPB (Sarawak) Sdn Bhd v Sumber Tebrau (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1-24-1871 OF 1999

KAMALANATHAN RATNAM J

B

13 JANUARY 2000

Land Law *— Restraints on dealings — Caveat — Removal of caveat — Entry pursuant to sale and purchase agreement — Nature of claim of caveator not stated in entry application — Interest of caveator only to a portion of land — Plaintiff in possession of original land title, whether amount to lien in equity — Whether entry of caveat valid*

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Chase Perdana Bhd ('CPB') entered into an agreement to carry out some works for Port Dickson Land Development Sdn Bhd ('PDLD'). As PDLD failed to procure a bank guarantee under the agreement, an original land title which was registered in Pembinaan Kota Laksamana (Melaka) Sdn Bhd's name was deposited with CPB as security for the

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payment of the contract sum. CPB and PDLD then entered into a settlement agreement whereby PDLD agreed to procure the transfer of the piece of land in favour of CPB or its nominees as part payment of PDLD's debts. CPB nominated the plaintiff to be the transferee. The plaintiff discovered that a private caveat was lodged by the

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defendant over the land and applied for the removal of the private caveat. The defendant opposed the application on the ground that it was entitled to enter the caveat as it was one of the three purchasers who had entered into a sale and purchase agreement with the owners of the land.

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Held, allowing the plaintiff's application:

(1) Neither the defendant's application for entry of private caveat in the prescribed Form 19B nor the statutory declaration annexed thereto stated the nature of the defendant's claim as required by item 2 of Form 19B. The failure of the defendant to state the

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grounds to support the caveat was sufficient for the court to remove the caveat (see pp 369G–H, 370A–B); *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 followed.

(2) The defendant also failed to comply with the mandatory requirement of Form 19B of describing in the schedule the land

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upon which the caveat was to be lodged. On the facts, as the defendant was one of the purchasers of the land, it only had an interest in a portion of the land and not the entire land. This fact would have been clear if the defendant exhibited the sale and purchase agreement to the statutory declaration (see pp 369I, 370D–F).

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(3) The statutory declaration of the deponent annexed to the caveat did not bear any jurat even though the deponent did not understand the national language. This was a fatal flaw because

there was no evidence the deponent understood the contents thereof (see p 370B–D).

(4) Even if the defendant had a caveatable interest in the property, it took subject to the plaintiff's prior interest. As the plaintiff had possession of the title, the plaintiff had acquired a lien in equity over the land (see pp 370G–371A); *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 followed.

[Bahasa Malaysia summary

Chase Perdana Bhd ('CPB') telah mengikat suatu perjanjian untuk menjalankan kerja-kerja untuk Port Dickson Land Development Sdn Bhd ('PDLD'). Oleh kerana PDLD gagal memperolehi jaminan bank di bawah perjanjian tersebut, suatu hakmilik tanah yang asal yang didaftarkan atas nama Pembinaan Kota Laksamana (Melaka) Sdn Bhd telah didepositkan dengan CPB sebagai cagaran untuk bayaran jumlah kontrak. CPB dan PDLD kemudiannya mengikat suatu perjanjian penyelesaian yang mana PDLD bersetuju memperolehi pindahmilik tanah tersebut memihak kepada CPB atau namaan-namaannya sebagai sebahagian bayaran hutang PDLD. CPB telah menamakan plaintif sebagai penerima pindahmilik. Plaintif mendapati bahawa suatu kaveat persendirian telah dikemukakan oleh defendan atas tanah tersebut dan memohon supaya kaveat persendirian tersebut dibatalkan. Defendan membantah permohonan ini berdasarkan alasan-alasan ia berhak memasukkan kaveat tersebut kerana ia merupakan salah satu daripada tiga pembeli yang telah mengikat perjanjian jual beli dengan tuanpunya tanah tersebut.

Diputuskan, membenarkan permohonan plaintif:

(1) Baik permohonan defendan untuk kemasukan kaveat persendirian dalam Borang 19B yang ditetapkan mahupun pengisytiharan berkanun yang dilampirkan menyatakan sifat tuntutan defendan seperti yang dikehendaki oleh butiran 2 Borang 19B. Kegagalan defendan untuk menyatakan alasan-alasan bagi menyokong kaveat adalah memadai untuk mahkamah membatalkan kaveat tersebut (lihat ms 369G–H, 370A–B); *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 diikut.

(2) Defendan juga telah gagal mematuhi keperluan mandatori Borang 19B untuk memperihalkan tanah yang mana kaveat hendak dikemukakan dalam jadual. Atas fakta-fakta, oleh kerana defendan merupakan salah satu pembeli tanah tersebut, ia hanya mempunyai kepentingan dalam sebahagian tanah tersebut dan bukannya dalam keseluruhan bidang tanah tersebut. Hakikat ini tentunya jelas sekiranya defendan telah mengekshibitkan perjanjian jual beli bersama pengisytiharan berkanun (lihat ms 369I, 370D–F).

(3) Pengisytiharan berkanun saksi sumpah yang dilampirkan bersama kaveat tersebut tidak menunjukkan apa-apa jurat walaupun saksi sumpah tidak memahami bahasa kebangsaan. Ini merupakan ketidaksempurnaan yang ketara kerana tiada keterangan bahawa saksi sumpah memahami kandungannya (lihat ms 370B–D).

(4) Andainya defendan mempunyai kepentingan boleh kaveat dalam hartanah tersebut, ia tertakluk kepada kepentingan dahulu plaintif. Memandangkan plaintif berhak ke atas hakmilik, plaintif telah memperolehi lien dalam ekuiti atas tanah tersebut (lihat ms 370G–371A); *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 diikut.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2580–2810.

Cases referred to

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Standard Chartered Bank v Yap Sing Yoke & Ors [1989] 2 MLJ 49 (folld)

Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (folld)

Legislation referred to

National Land Code 1965 ss 211, 323(2), (3) 327(1), Form 19B

Yee Teck Fah (*Yee Teck Fah & Co*) for the plaintiff.

Michael Chow (*A Rengganathan & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

This is an application by the plaintiff for the removal of a private caveat on land held under HS(D) 33860, No PT 1185, Mukim Kawasan Bandar VI, Daerah Melaka Tengah, Negeri Melaka ('the property') entered by the defendant. There were also consequential orders prayed for.

By an agreement dated 20 May 1995 ('the contract') entered into between Port Dickson Land Development Sdn Bhd ('PDLD') and Chase Perdana Bhd ('CPB'), CPB had agreed to carry out and complete certain works ('the works') upon the terms and conditions contained therein. It was an express term of the contract that PDLD would procure a bank guarantee in favour of CPB for the contract sum ('the contract sum') as defined in the contract. PDLD failed to procure the said bank guarantee despite the fact

that CPB has carried out and completed certain portion of the works. To allay CPB's concern PDLD agreed to deliver and deposit the original document of title to the said property as security for the payment of the contract sum.

When the amount due under the contract reached RM30,554,800.78 ('PDLD's debt'), PDLD agreed to cause the property to be transferred and registered in the name of CPB or its nominee as part payment towards PDLD's debt. Before the execution of a settlement agreement dated 26 March 1999 between CPB and PDLD ('the settlement agreement'), PDLD assured CPB that a caveat that was lodged would be removed. Clause 3 of the settlement agreement provided that PDLD should take all steps and do all acts within its power to procure, inter alia, the defendant to execute and deliver to CPB a valid and registrable transfer to vest the ownership of the said property to CPB or its nominee.

Pursuant to the settlement agreement, Pembinaan Kota Laksamana (Melaka) Sdn Bhd ('PKL') and CPB entered into an agreement dated 26 March 1999 ('the PKL agreement'). Clause 1 of the PKL agreement provided that in consideration of the premises contained therein, PKL agreed to transfer and to register the said property in favour of CPB or its nominee, free from all encumbrances and with vacant possession. CPB in exercising its right of nomination in accordance with the settlement agreement and the PKL agreement, nominated the plaintiff to be named as the transferee in the memorandum of transfer of the property. Notice of assessment of stamp duty on the memorandum of transfer of the property was issued by the stamp duty office on 19 June 1999. The plaintiff being dissatisfied with the assessment of stamp duty appealed against the assessment. The plaintiff's appeal was rejected by the stamp duty office on 27 August 1999. However, an extension of time up to 15 November 1999 was granted to the plaintiff to pay the stamp duty on the memorandum of transfer as assessed. A search made at the relevant land office revealed that the caveat lodged had not been removed and despite the plaintiff's solicitors letter of demand, the defendant had refused and failed to do so.

Findings of the court

The defendant opposes this application on the basis that it was entitled to enter the caveat by virtue of a sale and purchase agreement dated 12 March 1997 entered into between PKL as vendor and three other purchasers, namely, Nyala Singa (M) Sdn Bhd ('Nyala'), the defendant herein and one Tulin Panorama (M) Sdn Bhd, in respect of the said property.

The plaintiff's application to remove this caveat is pursuant to s 327(1) of the National Land Code 1965 (NLC). The said section reads as follows:

> Removal of private caveats by the Court
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> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

Aggrieved persons

It is therefore necessary to see if the plaintiff is an aggrieved person under the Act. In *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, the Court of Appeal held that the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means that one is dissatisfied with or is adversely affected by, a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. So said the Court of Appeal. The category of aggrieved persons is never closed. Pursuant to the facts which I had narrated in extensio to show the link, the plaintiff is indeed an aggrieved person.

How the court must decide

It is fortunate that the decision of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 has made life easier for lesser mortals like us. The explicit guidance given is highly commendable. It advocates the procedure to be adopted when considering an application for the removal of a caveat, which is, that it should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies. With this guideline, I will now examine the application made to register the caveat.

Form 19B

The provision for entering a private caveat is governed by s 323, and sub-s (2) requires that any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only. In the case before me, the Form 19B has been exhibited to the defendant's affidavit to oppose this application.

Under item 2 in the Form 19B, which requires the caveator to state the grounds for entering the caveat the defendant had merely stated 'Sila lihat surat akuan yang dilampirkan'. However, the 'surat akuan' did not state the nature of the defendant's claim. Therefore what appears before me is a Form 19B which does not state the nature of the defendant's claim on which the application to enter the caveat had been based. It does not even state whether the caveat is to be expressed to bind the land itself or a particular interest only.

Further, the Form 19B stipulates as a mandatory requirement the need to describe in a schedule the land upon which the caveat is to be lodged. Here again the defendant had failed to comply.

Another defect in the Form 19B is non-compliance with s 323(3) of the NLC which requires the defendant or its advocate and solicitor, to verify by a statutory declaration, so far as it sets out, the claim of the caveator, giving rise thereto. There was an abject failure to comply with this subsection. Bound as I am therefore upon the authority of *Wu Shu Chen* which held that failure by a caveator to state the grounds to support the caveat would be sufficient for the court to remove his caveat, I had no hesitation in granting the applicant the relief sought.

Another interesting issue raised by the plaintiff was the fact that the 'surat akuan' was affirmed by a person who did not understand the national language. The affidavit affirmed by one Alexander Gavin Brown, with a New Zealand passport, and having a residential address in Liaoning Province, China, filed to oppose this application, showed that the deponent did not understand the national language as the attached jurat showed that the contents of the affidavit had to be translated to him in English. However, the 'surat akuan' which he has annexed to his caveat, bears no jurat. I find that this is also a fatal flaw because there is no evidence before me that the said same deponent who affirmed the 'surat akuan', did in fact understand the contents of the 'surat akuan'.

Further, based on the decision in *Wu Shu Chen*, I find that the very fact that the defendant had failed to disclose or exhibit the sale and purchase agreement which he had referred to in the 'surat akuan', is also a fatal error because any person making a search on his caveat application form would have no notice of the contents of the sale and purchase agreement. There is force in this finding because when the agreement was finally disclosed by the defendant in its affidavit, it showed that the defendant was not the only purchaser of the said property. As narrated in the facts the defendant was one of the three joint purchasers of the said property. This was never disclosed by the defendant even in its Form 19B. On the contrary, Alexander Gavin Brown states that the defendant purchased the said property. This is not true. The defendant, if at all it has an interest in the said property, clearly only has an interest in a portion of the said property. It therefore had no interest in the entire property and it failed to state this material fact in its application to enter the caveat.

Prior claim

In any case even if it be held that the defendant has a caveatable interest in the said property, it must take the property, subject to the plaintiff's prior interest. I accept and adopt the reasoning of Lamin J (as his Lordship then was) in *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 wherein his Lordship said at p 53E–F:

> There is no doubt in my own mind as to the position of the law that by virtue of the unregistered charge dated 1 April 1985 (exh SWK 1 to encl 3) in favour of the plaintiff, the plaintiff had acquired a title in equity over the said land. As the issue document of title was all the time in the custody of the plaintiff it had acquired a lien in equity over the land: *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ 59 and *Mercantile Bank Ltd v Official Assignee of the*

A *Property of How Han Teh* [1969] 2 MLJ 196. The depositee, ie the plaintiff bank in the present case, has the right to lodge a caveat and may do so at any time under the provisions of the National Land Code.

Therefore as in this case since the plaintiff has had possession of the title, it would take an interest prior to that of the defendant. Therefore on 11 November 1999 when I heard this application, I granted an order in terms of the plaintiff's prayers to remove the caveat, that is, prayer (1). I also granted an order in terms of prayers (2), (3), (4) and (5) being the consequential orders sought.

Application allowed.

Reported by Chin En Tek